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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-816

DUN AND BRADSTREET, INC., a Delaware Corporation,
Petitioner,

vs.

KANSAS ELECTRIC SUPPLY COMPANY, INC.,
a Kansas Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March 3, 1972

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Kansas Electric Supply Company, Inc., respondent, opposes the issue of a Writ of Certiorari as requested by the petitioner herein.

OPINION BELOW

The Tenth Circuit Opinion is included in Appendix A of the Petition filed herein as is the Trial Court's Order Denying Defendant's Motion to Set Aside Verdict of the Jury and Judgment Thereon.

JURISDICTION

The basis of jurisdiction in the District Court was 28 U.S.C., Section 1332 (a) and the jurisdiction of this court is claimed under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Is a false report of bankruptcy issued in wilful, wanton and reckless disregard of the rights and interests of a business by a credit reporting agency of such "real public interest" that it is not actionable under State Libel Law?

2. Are the secret reports published "in STRICT CONFIDENCE" by a credit reporting agency entitled to the extended constitutional protection as "freedom of speech, or of the press;" provided by *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) and its progeny?

3. Is the rule set forth in *New York Times* v. *Sullivan*, a basis for immunity from liability for actual harm and general damages in regard to a mercantile credit agency publisher of false libelous statements regarding its subscriber, if the publication is published "with actual malice"?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 11 of the Bill of Rights of the Constitution of the State of Kansas:

> "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

and the First Amendment to the Constitution of the United States of America:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

This is an action for a libel per se brought by the plaintiff, Kansas Electric, an electric wholesale supply company, against Dun and Bradstreet, Inc., a mercantile credit agency, by reason of a false report published by D & B to the effect that Kansas Electric was in bankruptcy. The false report was circulated commencing April 14, 1964 and complaint was filed and action commenced on March 29, 1965. The matter was tried to a jury in May of 1969. The jury returned a verdict of $100,000 for compensatory actual damages, and $50,000 punitive damages, and a judgment was filed and entered by the Trial Judge. Thereafter D & B filed an extensive motion to set aside the verdict of the jury and judgment notwithstanding the verdict, or in the alternative, for a new trial. The motion was briefed, argued and was determined and denied by the Trial Judge on February 16, 1970. (The opinion of the Trial Court is set forth in full in Appendix A of the petition filed herein.) D & B then appealed the judgment to the United States Court of Appeals for the Tenth Circuit and the appeal was briefed, argued and determined there by the panel consisting of Clark, Associate Justice, United States Supreme Court, Hill and McWilliams, Circuit Judges, affirming the judgment of the Trial Court. This Petition for Certiorari follows.

STATEMENT OF RELEVANT FACTS

The record is clear in its recitation of the facts. Respondent is a domestic Kansas wholesale electric equipment and supply business, managed substantially by the founder and his wife, their two children and son-in-law. The company is located in Topeka and grew steadily there from 1939 until 1957, when three affiliates throughout the State of Kansas were added and growth continued. All purchases were made for all stores through Topeka and all credit was extended through Topeka. These facts and a net worth estimate of $350,000 to $500,000 by D & B were published and circulated by petitioner over a substantial period of time prior to the report here involved.

In 1958 one of respondent's customers, Dowling Electric Company, became indebted to respondent in the amount of about $30,000. From that time to the time here involved, April, 1964, respondent maintained a continuing interest in the Dowling financial condition through written reports from D & B and by informal oral reports and conversations (as often as every two months) with members of the two to three person staff of D & B located at its Topeka office.

On April 6, 1964, respondent's president contacted the manager of the Topeka office of D & B and advised him of some information about Dowling which he had received, and asked that D & B check the information and determine whether in fact Dowling was out of business and had settled with creditors other than Kansas Electric. On April 9, 1964, D & B issued a report confirming that Dowling was out of business.

On April 14, 1964, respondent, with two other creditors, who had not been paid by Dowling, filed a petition in involuntary bankruptcy against William Dowling and Ruth Dowling, d/b/a Dowling Electric Company, in the

United States District Court in Topeka. The petition alleged preferences to Richard Peters, Peters Electric, Inc., and Kriz Davis, Inc.

Roberta Adkins was secretary to the manager and clerk in the two to three person office maintained by P & B in Topeka. She was the office mainstay, being the only person who had been continually employed there since her original employment in 1959.

One of her duties was the checking of court proceedings. She denies any training by P & B management or supervisors by way of supervision, guides, manuals, seminars or other attention or supervision of the reporting work assigned to her, except that on her first day at work her predecessor had introduced her to the staff clerks of the various courts and shown her how to fill out some routine forms.

About four o'clock P.M. on April 14, 1964 Mrs. Adkins went across the street to the office of the Clerk of the United States District Court, took the petition in bankruptcy against Dowling in hand, and made notes which she immediately relayed to the Kansas City Office of P & B. Mrs. Adkins claims that at the time she took the petition in hand, the caption of the petition was not on the petition, or at least she didn't remember it being there.

She had no contact with the manager of the office for whom she was secretary but made her contact direct with Mr. Appleby in the Kansas City Office of P & B by telephone, stating that a petition had been filed against Kansas Electric by Dowling, Peters and Kriz Davis to put Kansas Electric in involuntary bankruptcy.

Mr. Appleby took the telephone message, walked directly to the desk of his subordinate, Ed Tenny, who had had his job for approximately two weeks, and told him

"This is an involuntary petition in bankruptcy against Kansas Electric Supply, and it is correct." Mr. Tenny took out the Kansas Electric file, looked at the last report on respondent, indicating a net worth of $350,000 to $500,000, such net worth being represented by cash, inventory and accounts receivable, and, pursuant to the direction of his superior, prepared and saw to the immediate distribution of a *pink special notice*, to all subscribers listed as having a "continuing interest", some thirty-five or thirty-six companies throughout the United States.

The notice was entitled *Bankruptcy* and reported that a petition in involuntary bankruptcy had been filed against Kansas Electric Supply Company, Inc. and that its credit rating is "under investigation, formerly B+2".

The whirlwind was loose. On the next morning banks, the Small Business Administration, a city manager, the Office of the Attorney General of Kansas, suppliers, competitors, and customers throughout at least five states were telephoning back and forth to each other and D & B regarding the report. Competing salesmen in the industry called suppliers and others long before their companies received the orginal report. After being notified of the disaster by an officer of Kansas Electric, D & B checked with the attorneys for respondent and learned the true facts. Some arrangements for a written retraction were made and some additional suppliers were notified of the mistake at the request of Kansas Electric. Arrangements were tentatively made to issue a written retraction to the Kansas Electric trade, but D & B failed to follow up. Some of the written retractions reported that the net worth of Kansas Electric was $200,000 less than the true worth. A new report on Kansas Electric dated April 17, 1964 was published and circulated. The new report suggested as "pending" the $100,000 S.B.A. loan which the preparer, Mr. Tenny, knew to have been granted and the

report failed to report other current information. It also failed to note that the *false special notice* which was on that day arriving in some offices around the country, was indeed false. D & B's agent in charge of preparing and distributing the notice testified, "We find that in these reports that we can never count on anything being read as it is written."

D & B knew, or should have known, that the libel would be widely circulated and that D & B is responsible for circulation to third persons. D & B claimed protection by its written statement and contracts that the "report is furnished . . . IN STRICT CONFIDENCE". . . D & B *took no action* and *produced no evidence* that they had ever, at any time, *made any effort* to enforce or make meaningful their contract provisions with regard to maintaining the confidentiality of their reports. They knew of five subscribers who had received the false reports in this instance and had disclosed it to others, and all five such violating subscribers were still subscribers at the time of trial and no sanction against them had been made. In fact, *Kansas Electric would never have known of the false report if the contract caveat had been honored.*

The business of Kansas Electric had maintained steady growth for twenty-five years. The industry continued steady growth through the time of trial. As soon as existing orders were shipped after the libel by D & B in April, 1964, the business volume of respondent commenced a steep decline, which was apparently flattening out at the time of trial in the spring of 1969. Credit was restricted, suppliers lost, and business evaporated. No cause for the losses was suggested by reason of any change in the business management or operation other than the libel. The damage is actual harm and a direct consequence of the false report by D & B. The undisputed evidence was that

at least, conservatively, $109,000 in general loss of profit had been sustained by Kansas Electric between April, 1964 and January, 1969.

Kansas Electric prayed for $100,000 compensatory damages and $100,000 punitive damages. The court instructed, following Kansas libel law, that D & B had a conditional privilege that could only be overcome by "actual malice". The trial jury found for respondent in the sum of $100,000 general damages and $50,000 punitive damages. The Trial Court found, and the Appellate Court agreed: "The verdict was large. It could have been much larger. The facts reveal a reckless disregard on the part of the defendant as to whether the statements in its communications were true."

ARGUMENT

This cause should not be reviewed by this court. There is no conflict of decisions, the Third Circuit Court of Appeals in *Grove* v. *Dun and Bradstreet, Inc.*, 434 F. 2d 433, ... U.S. ....., ... S. Ct. ..... (1971) (71-206), cert. denied, and the Tenth Circuit Court of Appeals in this case being in complete agreement. There is no generally important question to the American public to be determined herein. The facts of this case are sufficiently unique that review by this court, as requested, would affect few, other than the litigants here, and the facts here would not provide an issue before this court which would determine the controversy between the parties.

Reasons for Not Granting the Writ

I

This case is limited to the question of the right of a credit reporting agency to issue a false report of bankruptcy in wilful, wanton and reckless disregard of the rights and interest of the respondent.

This court denied certiorari in *Grove* v. *Dun and Bradstreet, Inc.*, 438 F. 2d 433 (C. A. 3), ... U.S. ....., ... S. Ct. ..... (1971) (71-206), the case with some similarity to the case in this matter. The *Grove* case was a libel per se case under Pennsylvania law growing out of a report by the same petitioner here, Dun and Bradstreet, of a notation that a confession of judgment in the penal sum of $60,000 had been entered against a small brick and tile brokerage company. The Third Circuit in that case found that there was clearly no test under the facts there requiring "actual malice" which could be satisfied by the operative facts there. In the instant case under Kansas law the burden of actual malice was necessary to overcome the conditional privilege which Kansas law extends to mercantile credit reporting agencies. In the *Grove* case the Third Circuit stated:

> "Noting in *Butts, supra*, 388 U.S. at 152, 87 S. Ct. at 1990, 'the basic theory of libel has not changed,' and crystallizing the competing concerns of the First Amendment and 'society's "pervasive and strong interest in preventing and redressing attacks on reputation," *Rosenblatt* v. *Baer, supra*, 385 U.S. at 86, 86 S. Ct. 669,' Justice Harlan cautioned, however, that to take the rule found appropriate in *New York Times* to resolve the 'tension' between the particular constitutional interest there involved and the interests of personal reputation and press responsibility * * * as being applicable throughout the realm of the broader

constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc.* v. *Hill, supra* (385 U.S.) at 390 (87 S. Ct. 534), we counseled against 'blind application of *New York Times* v. *Sullivan*' and considered 'the factors which arise in the particular context.' Here we must undertake a parallel evaluation. 388 U.S. at 148, 87 S. Ct. at 1987."

and at 388 U.S., p. 152 this court continued

". . . Neither the interests of the publisher nor those of society necessarily preclude a damage award based upon improper conduct which creates a false publication."

D & B asserts that the Court of Appeals below held that an involuntary petition in bankruptcy filed in a United States District Court against this respondent was held not a matter of "real public interest".

There, of course, was no petition for involuntary bankruptcy filed against this company and thus the nonexistent petition could not be a matter of real public interest. The court below actually held that the business or credit standing of the respondent, Kansas Electric Supply Company, is not a matter of real public interest entitling D & B to the extended constitutional protection claimed. In so holding the Tenth Circuit relied upon *Grove*, supra (certiorari denied by this court), where the Third Circuit held at 438 F. 2d 436:

"We cannot accept the theory that plaintiff's business or credit standing is a matter of 'real public interest'. It may generally be true that 'the modern business corporation by virtue of its pervasive influence on the political, economic, and social aspects

> of American life, has necessarily become a subject of public concern to the extent that the critics of its operations and behavior must enjoy constitutional protection for erroneous statements made without actual malice.' But those cases which have required that corporate plaintiffs meet the more difficult constitutional quantum of proof have all involved corporations engaged in activities of real public interest, and are grounded in that distinction. We are not here dealing with a publication or broadcast alleging, for example, that plaintiff caused substandard building material to be used in these projects. Such operative facts might constitute a matter of grave public interest. Our research discloses no case, however, which would support the application of the more rigorous standard to the covert reportage of the credit standing of a small brick and tile brokerage firm, and we decline to do so now."

This case does deal with an area of recent public outrage in that the grave injustices to the public by credit reporting agencies, generally, have been the source of secret and confidential reports, correct and incorrect, to which the Congress has addressed itself in recent years by passage of the Consumer Credit Protection Act, 15 U.S.C. 1601 et seq. and 15 U.S.C. 1681. These Acts may not directly affect this transaction but indicate the need for individual citizens and entities within this society to be protected from false or inaccurate secret reports, and particularly those defaming and injuring citizens.

As the facts here relate this case does not deal with either an innocent publication or free flow of information. As a secret report claimed to be kept even from the person reported on by contract with all subscribers, it does not fall into the area of a medium entitled to extended constitutional protection.

The standard by which the acts of petitioner were gauged are those of Kansas libel law established in *Coleman* v. *MacLennon*, 78 Kan. 711, 98 Pac. 281, which rule of "actual malice" was adopted *by this court* in the *New York Times* v. *Sullivan* case at 376 U.S., p. 280. Publications like the New York Times, Time Magazine, The Ocala Star-Banner Newspaper, Metromedia, Inc. do not disseminate business or credit reports in secrecy under claim of special ability and knowledge to evaluate and investigate the business and financial reputation of other parties.

The Constitution of the State of Kansas in its Bill of Rights protects the liberty of the press and all persons to speak, write or publish their sentiments on all subjects subject to them "being responsible for the abuse of such rights". The First Amendment does not authorize defamation of a person or a business with "actual malice".

II

This case relates to a mercantile credit agency or credit reporting agency which is distinguishable from publication merely circulated to a restricted list of subscribers.

There is obvious reason to distinguish between a publication published to a restricted list of subscribers, generally, as might be the case with professional or trade journals, or information provided by investment advisors or broker dealers registered by the Securities and Exchange Commission, or political broadsides or letters, and the restricted publications such as the one here which for a fee proposes to provide in STRICT CONFIDENCE, contractually agreed to as not to be disseminated to third persons, information with regard to the credit and business reputation of selected persons. No "reference book" is involved in the record of this case and Dun and Bradstreet has not previously claimed to be a specialized news media

but specifically claims and offers secret and confidential reports and information contractually not to be in the "free flow of information".

In *Grove*, supra, the Third Circuit which authored the *Rosenbloom* Opinion, stated:

> "In the view we take of this case, moreover, there is a more fundamental flaw in defendant's attempt to clothe itself in the protective cloak of the *Times* standard. Based on a thorough review of the cases interpreting and applying the *Times* doctrine, we hold that the defendant's publication is not a medium entitled to that extended constitutional protection."

In the *Grove* case the court found a patent distinction between publications which disseminate news for public consumption and one which provides specialized information to a select, finite audience wherein by contractual stipulation each subscriber agrees that the information received is for the exclusive use of the subscriber and

> "such information shall be held in strict confidence and shall never be revealed or made accessible in any manner whatever to the persons reported upon or to any others." (P. 437)

The court in *Grove* further proceeded to analyze the difference in that the extended constitutional doctrine rests on the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest government policies, and that the parties defamed would have sufficient access to the means of counter argument to be able to expose through discussion the falsehoods and fallacies of defamatory statements. In the *Grove* case, as adopted by the Tenth Circuit in this case, the court has found

> "Plaintiff here is denied that opportunity to respond to such false assertions, both because it lacks the very

access to the medium which *Times* and its progeny assumed, and for the more pernicious reason, that the source or nature of the assertions may never be exposed."

D & B in this case is *claiming the right* with regard to one of their subscribers of more than twenty-five years' standing with whom they have had contacts every other month regarding that subscriber's debtor to *manufacture* out of whole cloth by use of employees whom they have neither trained nor concerned themselves with training or supervising, to falsely and secretly report to other subscribers that this respondent has been put in bankruptcy by the same debtor they have been watching for the subscriber. They have offered as a defense that they were almost right and that Kansas Electric probably should have been bankrupt anyhow, and, therefore, could not have been damaged by the libel!

Review of this action by this court looking toward acceptance of petitioner's proposed rule can only serve to grant license to defame at will and in secrecy the other industries and businesses which make up the commerce of this nation in a manner similar to that by which such damage was caused to respondent herein.

III

Petitioner suggests that the court should decide what types of damage awards are consistent with a libel made with actual malice as in this case.

The evidence here clearly shows that the management of D & B failed totally to make any effort to supervise, train, or prepare its employee for the responsible job of reviewing court proceedings and making reports as to what they said. Establishment of the rule now proposed by D & B would allow it to continue with impunity its total lack of concern previously demonstrated, and, in fact, to

allow it to rely upon the ignorance and lack of training, manuals, and supervision as justification for so-called "innocent" mistakes.

The suggestion of petitioner is that some actual specific dollar from some specific sale must be shown as damage.

A wise old Kansas Appellate Judge once remarked that "The cases must be very rare where the injury or destruction of a business by a libel can be directly traced to the mischief caused by the libel."

The damage award made in this case is well substantiated by the evidence which was carefully reviewed and approved by the Trial Court and by the Tenth Circuit as being sufficient in law to establish the actual damage resulting from the injury caused by the petitioner. This court has shown great concern with reference to damage and here is well within Mr. Marshall's and Mr. Stewart's opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S. Ct. 1811 (1971) that "damages can be awarded for more than direct pecuniary loss but must be related to some proven harm." The harm was proven here and punitive damages are peculiarly appropriate upon the acts of the petitioner in failing to establish any procedure for training or supervising their personnel. It would seem that the inducement of exemplary damages, although slight, could cause the petitioner to institute some kind of a program whereby reporters of court proceedings would appreciate the purpose and meaning of the caption of a law suit.

The jury properly gave general damage on the undisputed evidence of the general loss of profit sustained by respondent to the time of trial based upon the evidence of restricted credit, suppliers lost, and evaporated business —actual harm properly compensable and payable by the injuring party.

CONCLUSION

No conflict of decisions exists in the courts below and no generally important question to the American public or any broad range of publications is suggested by the petition. This case was tried and proven on the basis of actual malice and actual harm and only suggestions of special privilege for secret reports authorizing immunity from direct injury to the business community is suggested for review. We respectfully submit that the court should refuse petitioners's prayer for a Writ of Certiorari.

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